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OF THE
United States

OCTOBER TERM 1962

No. ~~100~~ 65

WEYERHAEUSER STEAMSHIP COMPANY,	}	<i>Petitioner,</i>
vs.		
UNITED STATES OF AMERICA,		

**PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.**

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Subject Index

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement of the case	3
Reasons for granting the writ	5

I

The Court of Appeals has created the first known exception to the rule of divided damages in admiralty in mutual fault collisions, requiring Supreme Court review of this important question..... 5

A. Sovereign immunity of the United States is not a valid ground for denying the application of the divided damages rule to personal injury settlements 6

B. Congress did not intend to make the third person unfortunate enough to injure a beneficiary of a Compensation Act the gratuitous statutory indemnitor of the beneficiary's wrongdoing employer 8

II

The Court of Appeals has decided that exclusive liability provisions of federal compensation legislation bar recovery by a third party against a negligent employer in direct conflict with the applicable decisions of this Court 9

III

The Court of Appeals has adopted a rule of vessel liability in mutual fault collisions in direct conflict with accepted admiralty principles, requiring an exercise of this Court's power of review 12

IV

By holding that in a mutual fault collision the United States could not be called upon to share the item of

TABLE OF AUTHORITIES CITED

	Pages
damages resulting from payments by the other vessel to Government employees, the Court of Appeals for the Ninth Circuit is in conflict with the Court of Appeals for the Fourth Circuit.....	13
Conclusion	15
Appendices.	

Table of Authorities Cited

Cases	Pages
American District Telegraph Company v. Kittleson (8th Cir., 1950) 179 F. 2d 946.....	9
Baugh v. Rogers (1944) 24 Cal. 2d 200, 148 P. 2d 785....	11
Canadian Aviator Limited v. United States of America (1945) 324 U.S. 215	7
Crumady v. The Joachim Hendrick Fisser (1959) 358 U.S. 423	10, 11
Haleyon Line v. Haenn Ship Ceiling and Refitting Corporation (1952) 342 U.S. 282.....	5, 14
Lunderberg v. Bierman (1954) 63 N.W. 2d 355.....	9
Montgomery Ward & Company v. KPIX Westinghouse Broadcasting Company, Inc., District Court of Appeal, First District, California; opinion filed January 5, 1962	11
Ryan Stevedoring Company, Inc. v. Pan-Atlantic Steamship Corporation (1956) 350 U.S. 124.....	10, 11
S.F. Unified School District v. Cal. Building (1958) 162 Cal. App. 2d 434, 328 P. 2d 785.....	11
Smithers & Company, Inc. v. Coles (D.C.Cir., 1957) 242 F. 2d 220, cert. den. 354 U.S. 914.....	12

TABLE OF AUTHORITIES CITED

iii

	Pages
The Chattahoochee (1899) 173 U.S. 540.....	13, 14
The North Star (1882) 106 U.S. 17.....	5, 14
The Sucarseco (1934) 294 U.S. 394.....	13
The Thekla (1924) 266 U.S. 238.....	7, 12
The Toluna (2d Cir. 1934) 72 F. 2d 690.....	13
The Washington-Ruchamkin (1959) 172 F. Supp. 905, af- firmed upon the opinion of the District Court (1959) 272 F. 2d 711	13, 14, 15
The Western Maid (1922) 257 U.S. 419.....	7
United States v. Shaw (1940) 309 U.S. 495.....	7, 12
Westchester Lighting Company v. Westchester County Small States Corporation, 278 N.Y. 175.....	9
Weyerhaeuser Steamship Company v. Nacirema Operation Company, Inc. (1958) 355 U.S. 563.....	10, 11

Statutes

Federal Employees Compensation Act, 5 U.S.C., Sections 751 et seq.	4
5 U.S.C. 757(b)	3, 6, 8, 9, 10
28 U.S.C. 1254 (1)	2
28 U.S.C. 1345	2
28 U.S.C. 1346	2
28 U.S.C. 2101 (f)	4
Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 905, Section 5	9
Servicemen's Indemnity Act of 1951, 38 U.S.C. 851.....	14
Harter Act, 46 U.S.C. 192	13
46 U.S.C. 781 et seq.	2, 7
Public Vessels Act of 1925, 46 U.S.C. 790.....	7

Miscellaneous

4583 U.S. Supreme Court Records, Docket 4, Brief for the United States as Amicus Curiae, page 44	11
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In the Supreme Court
OF THE
United States

OCTOBER TERM 1961

No.

WEYERHAEUSER STEAMSHIP COMPANY,	}
<i>Petitioner,</i>	
VS.	
UNITED STATES OF AMERICA,	}
<i>Respondent.</i>	

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

Petitioner Weyerhaeuser Steamship Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit rendered in the above-entitled case on August 30, 1961.

OPINIONS OF THE COURTS BELOW

The memorandum opinion of the District Court, printed in Appendix A hereto, *infra*, page i, is reported in 174

F. Supp. 663, and supplemented in 178 F. Supp. 496. The opinion of the Court of Appeals for the Ninth Circuit, printed in Appendix A hereto, *infra*, page xii, is reported in 294 F. 2d 179.

JURISDICTION

The jurisdiction of the district court was invoked by reason of petitioner's libel against the United States as a result of a maritime collision. 46 U.S.C. 781 et seq., 28 U.S.C. 1346. The United States filed a cross-libel, invoking the jurisdiction of the district court pursuant to 28 U.S.C. 1345.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 30, 1961. A timely petition for rehearing, filed on September 29, 1961, was denied on October 24, 1961.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Is the historic and established admiralty rule of divided damages in mutual fault collisions for the first time to be altered by a federal compensation statute?

STATUTE INVOLVED

The Federal Employees' Compensation Act, 5 U.S.C. 751, et seq., provides in pertinent part as follows:

5 U.S.C. 757 (b)—“The liability of the United States or any of its instrumentalities under Sections 751-756, 757-791, and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or any Federal tort liability statute . . .”

STATEMENT OF THE CASE

On September 8, 1955, the Liberty ship SS F.E. WEYERHAEUSER, owned by petitioner, and the Army Dredge PACIFIC, owned by the Corps of Engineers of the United States Army, collided. (R. 5, 6) After the filing of a libel by petitioner (R. 3) and a cross-libel by the United States (R. 16), the District Court found both vessels were to blame and, according to the settled admiralty doctrine, ordered that each vessel was entitled to recover from the other one-half of all provable damages and court costs. (R. 71-78)

As a result of this collision one Reynold E. Ostrom, a seaman aboard the PACIFIC and a Civil Service Employee of the United States, sustained personal injuries. (R. 72) Ostrom was an “employee of the United States” within the coverage of the Federal Employees' Compen-

sation Act, 5 U.S.C. Sections 751 *et seq.* (R. 72) He received \$329.01 as statutory compensation and then commenced a separate action in the District Court against petitioner to recover general damages for his injuries. (R. 73) This action was settled by petitioner by the payment of \$16,000 to Ostrom, which was stipulated to be a reasonable amount by the United States (R. 68), and Ostrom reimbursed the United States the full \$329.01 compensation.

The \$16,000 paid by petitioner to Ostrom was specifically held by the District Court, with the Government protesting, to be a proper item of the damages to be divided pursuant to the accepted admiralty formula. (R. 74) The Government protested the inclusion of the item in a Motion for Rehearing, which was limited to that matter. (R. 79) After the District Court denied a rehearing (R. 92), the United States sought review in the Court of Appeals for the Ninth Circuit. The case was argued and submitted on August 1, 1961. (R. 148) On August 30, 1961 the court below reversed and remanded the case to the District Court with directions to recompute damages without allowance for the \$16,000 paid by petitioner to Ostrom. Appendix A. A timely petition for rehearing was made on September 29, 1961 (R. 162) and denied on October 24, 1961. (R. 162) Petitioner applied pursuant to 28 U.S.C. Section 2101 (f) for a stay of mandate upon the decision of August 30, 1961 in order to seek a review of the matter by this Court. On December 26, 1961 the Court of Appeals for the Ninth Circuit ordered the mandate stayed pending the disposition of this petition to be filed on or before January 20, 1962.

REASONS FOR GRANTING THE WRIT**I**

THE COURT OF APPEALS HAS CREATED THE FIRST KNOWN EXCEPTION TO THE RULE OF DIVIDED DAMAGES IN ADMIRALTY IN MUTUAL FAULT COLLISIONS, REQUIRING SUPREME COURT REVIEW OF THIS IMPORTANT QUESTION.

The rule of divided damages between the vessels in a mutual fault collision has long been accepted in courts of admiralty. *The North Star* (1882) 106 U.S. 17, 21. This Court recently stated the accepted rule in *Halcyon Line v. Haenn Ship Ceiling and Refitting Corporation* (1952) 342 U. S. 282, 284:

“Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each, as well as personal injury and property damage inflicted on innocent third parties. This maritime rule is of ancient origin and has been applied in many cases, but this Court has never expressly applied it to non-collision cases.”

The decision of the Court of Appeals for the Ninth Circuit creates the first exception to the divided damages rule, and in so doing, creates enormous potential liability for private shipowners without participation by an equally negligent Government vessel. Because this exception to the divided damages rule has been judicially legislated by the Court of Appeals and is of vital importance for the American shipping industry, this Court should grant review.

The retreat from the accepted policy that the two negligent ships in a both-to-blame collision divide the results of their negligence equally is justified by the Court of

Appeals by reason of the "exclusive liability" Section 757 (b) of the Federal Employees' Compensation Act. The Court states (Appendix A, *infra*, p. xxiv; 294 F. 2d 179, 185):

"Thus it must be candidly admitted that while the United States once had a duty *to other shipowners* [emphasis by the court] to navigate carefully in order not to injure its own employees, that duty has been abrogated by the [Federal Employees'] Compensation Act."

It is respectfully submitted that the rationale of the Court of Appeals is so clearly erroneous and in conflict with applicable decisions of this Court and Congressional enactments that review should be granted.

A. Sovereign immunity of the United States is not a valid ground for denying the application of the divided damages rule to personal injury settlements.

The Court of Appeals in its opinion states that if the settlement to Ostrom were included in the damages to be divided by the two vessels, the sovereign immunity of the United States would be violated. The court states (Appendix A, *infra*, p. xix; 294 F. 2d 179, 182):

"We do not presume that if there had never been a retreat by the United States from its absolute non-liability as a sovereign, appellee could or would here maintain that such claim of sovereignty was inferior to the right established by admiralty law, no matter how ancient, simply because unfair to the shipowner. . . . But can a limited waiver of sovereign immunity be enlarged by indirection, i.e. through the negligent act of a third party—the shipowner? We think not."

Because the statements of the Court of Appeals on sovereign immunity are inconsistent with the opinions of this Court and the expressions of congressional intent found in legislation, this Court should grant review to prevent further error in the large number of admiralty cases raising these points which come before the Court of Appeals for the Ninth Circuit.

The opinion of the court below would be in accord with this Court, if Mr. Justice Holmes had not reversed his very strict view of sovereign immunity expressed in *The Western Maid* (1922) 257 U.S. 419. In that case this Court held in a majority opinion by Holmes that the sovereign immunity of the United States prevented any affirmative relief in collision cases for private vessels unfortunate enough to be in collision with Government-owned vessels. But Mr. Justice Holmes, once more for the majority, reversed himself and specifically made the United States subject to affirmative relief in a mutual fault collision. *The Thekla* (1924) 266 U.S. 238. Subsequent to that decision, the Congress passed the Public Vessels Act of 1925, 46 U.S.C. 781-790. The intent of this statute was that the United States be liable *in rem* and *in personam* just as a private shipowner when federal vessels have tortiously caused personal injury or property damage. *Canadian Aviator Limited v. United States of America* (1945) 324 U.S. 215. In *United States v. Shaw* (1940) 309 U.S. 495, this Court affirmed the inapplicability of sovereign immunity as a shield for the United States in mutual fault collisions.

Petitioner respectfully submits that the burden should be placed on the Government in this case to show that

Section 757 (b) of the Federal Employees' Compensation Act has altered the existing law that the sovereign immunity of the United States is not a good defense to inclusion of the Ostrom settlement as an element of the affirmative relief against the United States in a mutual fault collision.

- B. Congress did not intend to make the third person unfortunate enough to injure a beneficiary of a Compensation Act the gratuitous statutory indemnitor of the beneficiary's wrongdoing employer.**

By barring the inclusion of the amount paid by way of settlement to Ostrom from the damages to be shared on grounds of the Compensation Act, the Court of Appeals attributes to Congress the intention of not only giving the employee a new cause of action against the employer but also by indirection the intention to take away all existing rights by third persons against the negligent employer. Petitioner respectfully submits that the words of Section 757 (b) of the Federal Employees' Compensation Act do not justify this conclusion of the Court of Appeals.

The limitation of the general words in Section 757 (b) "anyone otherwise entitled to recover damages from the United States"¹⁵ to "the employee, his legal representative, spouse, dependents, and next-of-kin"—to the exclusion of those with claims unrelated to the employment nexus—accords fully with the normal scope of workmen's compensation legislation. It is generally recognized that these statutes deal with the relationship of the employer with his employees and their dependents and that it is not to be assumed, in the absence of an express indication to

¹⁵ U.S.C. 757(b).

the contrary, that they are designed to interfere with the relationships of the employer with third persons. *American District Telegraph Company v. Kittleson* (8th Cir., 1950) 179 F. 2d 946; *Lunderberg v. Bierman* (1954) 63 N.W. 2d 355, 365; *Westchester Lighting Company v. Westchester County Small States Corporation*, 278 N.Y. 175, 179-180.

The opinion of the Court of Appeals should be reviewed by this Court to determine whether Congress intended to repeal rights of third parties against the Government in mutual fault collisions, in spite of the failure of the words of Section 757 (b) to so provide.

II

THE COURT OF APPEALS HAS DECIDED THAT "EXCLUSIVE LIABILITY" PROVISIONS OF FEDERAL COMPENSATION LEGISLATION BAR RECOVERY BY A THIRD PARTY AGAINST A NEGLIGENT EMPLOYER IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

In a series of decisions this Court has carefully considered the language of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 905, which is nearly identical to Section 757 (b) of the Federal Employees' Compensation Act and provides:

"The liability of an employer prescribed in Section 4 [for compensation] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . ."

The Court of Appeals for the Ninth Circuit, in referring to the above-quoted section and Section 757 (b) of the Federal Employees' Compensation Act concludes (Appendix A, *infra*, xxv; 294 F. 2d 179, 185):

"The [Longshoremen's and Harbor Workers' and the Federal Employees' Compensation] Acts, in establishing the duty of the employer and in making that duty exclusive, have abolished the independent rights of third parties against the employer for the damage which the employer causes them when he wrongfully injures his employee."

Petitioner respectfully submits that this statement, which is the justification by the Court of Appeals for denying the inclusion of the Ostrom settlement in the damages to be divided, is in direct conflict with decisions of this Court on the legal effect of "exclusive liability" provisions of Federal Compensation Acts.

In *Ryan Stevedoring Company, Inc. v. Pan-Atlantic Steamship Corporation* (1956) 350 U.S. 124, this Court held that where the injuries to the longshoremen-employee occurred through the fault of his employer, the third party shipowner has a right to receive full reimbursement from the stevedoring employer, regardless of the existence of the "exclusive liability" provision of the Longshoremen's and Harbor Workers' Compensation Act. Since that decision several other cases in this Court have confirmed the *Ryan* holding. *Weyerhaeuser Steamship Company v. Nacirema Operation Company, Inc.* (1958) 355 U.S. 563; *Crumady v. The Joachim Hendrick Fisser* (1959) 358 U.S. 423.

The decision of this Court in *Ryan Stevedoring Company, Inc. v. Pan-Atlantic Steamship Corporation*² was on the grounds of the existence of an express contract between the shipowner and the negligent employer, a possible distinction between the facts of that case and the instant one. The cases following *Ryan*, however, have permitted recovery by the third party shipowner on grounds of an implied contract (*Weyerhaeuser Steamship Company v. Nacirema Operating Company, Inc.*³) and a third party beneficiary theory (*Crumady v. The Joachim Hendrick Fisser*⁴). This Court should grant review to affirm that the absence of a contractual relationship between vessels in collision should not alter the principles expressed in the existing Federal Compensation Act cases in regard to Congressional intention in passing these statutes.⁵ As the Government argued to this Court in the *Ryan* case: "The compensation acts, in conferring immunity on the employer from common law suits by the employee and his dependents, did not mean to free the employer from suits by outsiders."⁶

² (1956) 350 U.S. 124.

³ (1958) 355 U.S. 563.

⁴ (1959) 358 U.S. 423.

⁵ It is significant that State courts in interpreting comparable "exclusive liability" provisions of compensation acts have held that the lack of an express contract for indemnity between a third party and a negligent employer is not a bar to recovery by the third party from the employer for amounts paid to an injured employee: *Raugh v. Rogers* (1944) 24 Cal. 2d 200, 148 P. 2d 785; *S.F. Unified School District v. Cal. Building* (1958) 162 Cal. App. 2d 434, 328 P. 2d 785; *Montgomery Ward & Company v. KPIX Westinghouse Broadcasting Company, Inc.*, District Court of Appeal, First District, California; opinion filed January 5, 1962.

⁶ 4583 U.S. Supreme Court Records, Docket 4, Brief for the United States as Amicus Curiae at page 44.

III.

THE COURT OF APPEALS HAS ADOPTED A RULE OF VESSEL LIABILITY IN MUTUAL FAULT COLLISIONS IN DIRECT CONFLICT WITH ACCEPTED ADMIRALTY PRINCIPLES, REQUIRING AN EXERCISE OF THIS COURT'S POWER OF REVIEW.

In denying the right of petitioner to include the Ostrom settlement as an item of damages in this collision, the Court of Appeals makes an analogy to the denial in *Smithers & Company, Inc. v. Coles* (D.C.Cir., 1957) 242 F. 2d 220, cert. den. 354 U.S. 914, of the wife's right under the Longshoremen's and Harbor Workers' Compensation Act to recover for loss of consortium. Petitioner respectfully submits that the nature of the liability of a vessel in a mutual fault collision differs fundamentally and historically from such derivative causes of action as represented by the cause of action for loss of consortium as well as from accepted tort principles of contribution between joint tortfeasors. This Court recognized the distinction in *United States v. Shaw, supra*:

"*The Thekla* turns upon a relationship characteristic of claims for collision in admiralty but entirely absent in claims and cross-claims in settlement of estates. The subject matter of a suit for damages in collision is not the vessel libelled but the collision. Libels and cross-libels for collision are one litigation and give rise to one liability. In equal fault, the entire damage is divided." (at page 502)

The special nature of a suit for division of damages after a mutual fault collision has been recognized by this Court in requiring the inclusion of cargo damage as an

item to be divided by the negligent vessels. Even though the Harter Act, 46 U.S.C. 192, provides categorically that cargo cannot collect directly from the carrying vessel for damages as a result of faults in navigation, this Court has held that the carrying vessel must share, according to the accepted divided damages rule, damages sustained by the non-carrying vessel attributable to its own cargo in a mutual fault collision. *The Chattahoochee* (1899) 173 U.S. 540, 551-555; *The Sucarseco* (1934) 294 U.S. 394. See also *The Toluma* (2d Cir. 1934) 72 F. 2d 690, 692.

Petitioner respectfully submits that the principle in issue herein is no different than the rule that vessels in a mutual fault collision share cargo damage regardless of the "immunity" for the carrying vessel given by the Harter Act.

IV.

BY HOLDING THAT IN A MUTUAL FAULT COLLISION THE UNITED STATES COULD NOT BE CALLED UPON TO SHARE THE ITEM OF DAMAGES RESULTING FROM PAYMENTS BY THE OTHER VESSEL TO GOVERNMENT EMPLOYEES, THE COURT OF APPEALS FOR THE NINTH CIRCUIT IS IN CONFLICT WITH THE COURT OF APPEALS FOR THE FOURTH CIRCUIT.

In *The Washington-Ruchamkin* (1959) 172 F. Supp. 905; affirmed upon the opinion of the District Court (1959) 272 F. 2d 711, the argument advanced by the United States in the instant case was rejected by the Court of Appeals for the Fourth Circuit. Four soldiers were killed aboard the Government vessel as a result of a collision with a privately owned tanker. There was a determination of mutual fault. The Court then found that

the privately owned vessel was entitled to include as an item of damages payments made by it to claimants injured in the collision without any deduction for damages paid by the Government as statutory death gratuities, indemnity or compensation. In the course of its opinion the court stated:

"But the court now holds that the Texas Company should be granted a judgment against the United States for one-half of the present awards, as a part of Texas' collision damages, without deduction for the veteran benefits." (Citing *The North Star, supra*, *The Chattahoochee, supra*, and *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation, supra*.) (at pages 909-910)

The opinion of the Court of Appeals for the Ninth Circuit dismisses *The Washington-Ruchamkin* case on the grounds that the point of the inclusion of amounts paid to injured Government employees as an element of damages was not contested by the Government. Petitioner's Petition for a Rehearing refutes this point. See Appendix B. The material in Appendix B establishes conclusively that the point in issue in the instant case was also in issue and contested throughout the *The Washington-Ruchamkin* case and was settled by Judge Bryan's opinion in the District Court, which was adopted by the Court of Appeals for the Fourth Circuit as its opinion.

Although the Federal Employees Compensation Act was not in issue in *The Washington-Ruchamkin* case, the servicemen's survivors had rights for indemnification against the Government solely because of the Servicemen's Indemnity Act of 1951, 38 U.S.C. 851; that is, the sovereign im-

munity of the United States would have prevented any direct action against the Government to recover for the loss of these men killed in the maritime collision, except for the rights granted dependents by this federal legislation. Petitioner submits that the holding of the Court of Appeals for the Fourth Circuit in the *The Washington-Ruchamkin* case is thus in conflict with the holding of the Court of Appeals for the Ninth Circuit in the instant case and justifies review by this Court.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated, San Francisco, California,
January 17, 1962.

Respectfully submitted,

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(Appendices Follow.)

Index to Appendix

Appendix A.	Page
Opinions and judgments of the courts below	i
Opinion of the District Court, dated July 2, 1959	i
Supplemental opinion of the District Court, dated July 13, 1959	x
Opinion of the Court of Appeals, dated August 30, 1961	xii
Final Decree, dated June 20, 1960	xxviii

Appendix B.	
Libel of Texas Company as owner of the Tanker Washington against United States of America, Admiralty No. 780	xxx
Answer of the United States, Admiralty No. 780	xxxi
Affidavit of Attorney Joseph M. Brush	xxxii
Brief and Appendix for the United States in United States Court of Appeals, Fourth Circuit, in Case No. 7191	xxxiii

Appendix A

OPINIONS AND JUDGMENTS OF THE COURTS BELOW

OPINION OF THE DISTRICT COURT,

DATED JULY 2, 1959

In the United States District Court for the Northern
District of California, Southern Division

No. 27,359

Weyerhaeuser Steamship Company,
a corporation,

Libelant,

vs.

United States of America,
Respondent.

United States of America,
Cross-Libelant,

vs.

Weyerhaeuser Steamship Company,
a corporation,
Cross-Respondent.

St. Paul Fire & Marine Insurance Co.,
a corporation, and Fireman's Fund In-
surance Co., a corporation,
Intervening Libelants.

Roche, District Judge.

This is an action by libelant, owner of the F. E. Weyerhaeuser, brought under the provisions of Public Vessels

Act, 46 U.S.C.A. § 781 et seq., against respondent, owner of the Pacific, for damages sustained by the Weyerhaeuser in a collision between the two vessels. Cross-libel by respondent for damages suffered by the Pacific.

At 5:30 P.M. on September 8, 1955, the Weyerhaeuser, a steel "Liberty" type cargo vessel 441 feet long with a gross tonnage of 7,218 tons, and the Pacific, a steel hopper dredge of 837 tons and 180 feet in length, collided approximately one and one-half miles west and slightly south of Cape Arago light off the Oregon coast.

At the time of the collision the sea was calm with variable breezes. There was dense fog and visibility was poor.

The Weyerhaeuser was southbound from Coos Bay, Oregon to Los Angeles carrying a cargo of lumber. The Pacific was northbound from Bandon, Oregon to Coos Bay without a cargo. Each vessel alleges having radar knowledge of the other's progress on an opposing course 18 minutes prior to the collision, at which time the two were 2.8 miles apart. Each remained almost continuously cognizant, by radar, of the other's position and bearing up to the time of the collision. The Weyerhaeuser made at least one course change to port between 5:00 P.M. and the collision and was under way with her only lookout positioned on the bridge. The Pacific made three course changes to starboard in the half-hour preceding the collision. The bow of the Pacific collided with the starboard side of the Weyerhaeuser and the two vessels parted again almost immediately. Communications were established some 30 minutes later and the vessels were able to proceed back to port unassisted.

Having considered the evidence, the law and the briefs and arguments of counsel, the court makes the following findings of fact with respect to each vessel.

The Weyerhaeuser

[1-3] Respondent contends that the lookout on the Weyerhaeuser was improperly positioned. It is undisputed that at the time of the collision no lookout was stationed in the bow of the Weyerhaeuser, although one was positioned on the bridge. Rule 29 of the International Rules for Navigation at Sea requires that a proper lookout be kept.¹ The rules themselves do not prescribe where the lookout must be posted, but the courts have been rigid in holding that lookouts must be stationed as far forward as possible, especially when vessels are proceeding under conditions of reduced or obstructed visibility. *The Ottawa*, 1865, 3 Wall. 268, 70 U.S. 268, 18 L.Ed. 165; *The Adrastus*, 2 Cir., 1951, 190 F.2d 883; *Wood v. United States (The Bucentaur-Wilson Victory)*, D.C.S.D. N.Y. 1954, 125 F.Supp. 42. The Weyerhaeuser's knowledge that another vessel was approaching would make the command even more imperative. The record reveals no substantial evidence that weather or topographical conditions excused compliance with the rule. The requirement is so strict that the presumption of contributory fault arising from its neglect is the same as that created by statutory violation. *The Adrastus*, supra; *Wood v. United States (The Bucentaur-Wilson Victory)*, supra. Thus, the Weyerhaeuser is liable for her fault unless she can show that it did not and could not have contributed to the collision.

¹33 U.S.C.A. § 147a.

The *Pennsylvania*, 1873, 19 Wall. 125, 86 U.S. 125, 22 L.Ed. 148. She failed to do this; a bow lookout, being closer to the Pacific when she was sighted, might have given earlier warning and the time gained might have enabled the *Weyerhaeuser* to avoid the collision.

[4, 5] Rule 16 of the International Rules states that a vessel proceeding under conditions of restricted visibility shall go at a "moderate" speed.² Such a speed is one that would enable a vessel to stop in one-half the range of visibility. The *Silver Palm*, 9 Cir., 1938, 94 F.2d 754. Libelant contends that visibility was 375 feet. Assuming *arguendo* that figure to be correct, a "moderate" speed would have allowed the *Weyerhaeuser* to stop in half that distance, or 188 feet from the forwardmost point on the ship that lookout was maintained. As the distance from bow to bridge on the *Weyerhaeuser* is 205 feet, and the forwardmost lookout was positioned on the bridge, it follows that no speed could have been "moderate" under the circumstances. The evidence is convincing that the *Weyerhaeuser* was moving fast when the two ships collided. The nature of the damage, the distance she traveled after collision, inadvertent admissions from her crew, dubious log and bell book entries and testimony from those aboard the *Pacific* who observed her all lead to that conclusion. And it is undisputed that she was under way until minutes before impact, with the same conditions prevailing. Again, the *Weyerhaeuser* was unable to sustain the burden imposed upon her by statutory violation. The *Pennsylvania*, *supra*. She is liable for contributory fault on a second count.

²33 U.S.C.A. § 145n.

[6] Rule 18 provides that when two vessels are meeting end on, or nearly so, each shall alter course to starboard so as to effect a port-to-port passing.³ The record discloses that the Weyerhaeuser and the Pacific admit detecting each other on opposing courses as early as 5:12 P.M. The Pacific turned to starboard but the Weyerhaeuser turned to port, and again they were on collision courses. Rule 18, written before the advent of radar as an aid to navigation, specifically refers to instances in which the vessels or their lights are visible to each other. This court can see no reason why its application should not extend to a situation in which two vessels "see" each other by radar.

It is argued that under the conditions of the instant case a right turn was not warranted because neither vessel could know that the other had radar and would abide by the rules. But even if the Pacific had not had radar, and had maintained a straight course, a right turn by the Weyerhaeuser would have avoided the collision and the same is true if the situation is reversed. Certainly, a left turn was totally unjustified. It is difficult to see how application of Rule 18 under these conditions would have anything but a positive effect upon safety.

Two cases are cited in support of the position that the meeting and passing rules do not apply in fog. *Borcich v. Ancich*, 9 Cir., 1951, 191 F.2d 392; *The George F. Randolph*, D.C.S.D.N.Y. 1912, 200 F. 96. Both are distinguishable from the instant case. In the former, fog made the burdened vessel unable to determine that there was an

³33 U.S.C.A. § 146b.

other vessel to starboard, and in the latter both vessels were uncertain of each other's location in the fog. Here, the Weyerhaeuser knew the location and course of the Pacific when she was almost three miles away. The court must conclude that the Weyerhaeuser should have turned right instead of left, and that her failure to do so is a statutory violation. She was unable to prove that her fault could not have contributed to the collision, and under the Pennsylvania rule, she is again liable.

The Pacific

[7, 8] Libelant asserts that the Pacific was proceeding at an "immoderate" rate of speed in violation of Rule 16.⁴ Respondent alleges that the Pacific was moving at Slow Ahead and that her headway was practically stopped when the Weyerhaeuser struck her. The testimony from those aboard the Pacific is inconsistent and contradictory. The tendency of officers and crew to "stick by the ship" in such matters is well known. The Silver Palm, *supra*. The Pacific's logs are grossly inadequate. The absence of log entries tends to discredit the testimony of witnesses from the vessel on disputed issues. *Arkansan-Knoxville City*, D.C.S.D.Cal., 1939 A.M.C. 352.

[9-11] Second Assistant Engineer Martin of the Pacific recorded the orders that he received immediately prior to the collision in his personal notebook and in the engine room log. The notebook relates, " * * * 5:30 P.M. * * * Heavy Fog—Whistle Operating—Martin on Throttles—Engines Full Ahead—Received 'Slow' port and starboard followed by immediate Full Astern * * * About 10

⁴33 U.S.C.A. § 145n.

seconds later felt impact from bow * * * Time from Slow Ahead to Full Astern not over 5 seconds." These observations were recorded shortly after the collision, were later confirmed by Martin (although loyalty induced him to attempt to moderate their impact at the trial) and have not been shown to be influenced by considerations reflecting upon their credibility. In the event of conflict between deck officers and engine room personnel as to a vessel's speed changes, the testimony and records of the latter are entitled to greater credence because they have better means of knowledge. The Bowns-Pattison Transportation Company v. The Beverly, The Brinton, D.C.S.D. N.Y. 1915, 1934 A.M.C. 316. Upon the presumptions created by the absence or alteration of log entries and the unconscious or reluctant admissions against the ship, many cases must be decided. The Ernest H. Meyer, 9 Cir., 1936, 84 F.2d 496. The court finds that the Pacific was proceeding at her full speed of 7 knots prior to the collision.

Captain Albee testified that in his opinion the Pacific could come to a stop from full ahead in three lengths of the vessel, or approximately 540 feet. The most generous estimates of visibility at the time in question placed it at 375 feet. It is clear that the Pacific was not proceeding within the "moderate" speed required by statute, since she was not able to stop within one-half the range of visibility, or 188 feet. The Silver Palm, *supra*. The record substantiates this conclusion and indicates that had the Pacific been able to stop in her share of the range of visibility the collision might have been avoided. Respondent was unable to overcome the presumption of contribu-

tory fault arising from the Pacific's violation of Rule 16. The *Pennsylvania*, *supra*.

Respondent contends that the Pacific's faults, if any, were committed *in extremis* and may be excused. But the nature of an error *in extremis* is that it is committed when collision is imminent and there is no opportunity to exercise proper judgment. The *Chinook*, 2 Cir., 1929, 34 F.2d 614. There are no hard or fast rules to apply, but the error of the Pacific was clearly not committed *in extremis*. Captain Albee admits turning the Pacific sharply to starboard five minutes before the collision and the preponderance of evidence shows that the Pacific then proceeded at "immoderate" speed on her new course. Evidently Albee's intention was to remove the Pacific from the danger area as quickly as possible in whatever time remained. Albee may have been unfortunate but the court cannot avoid the conclusion that prudent seamanship would have been a satisfactory cure.

[12] The International Rules require that a vessel hearing the fog signal of another vessel, the position of which is not ascertained, shall stop her engines and then navigate with caution until the danger is past.⁵ The record discloses that neither vessel stopped her engines upon first hearing the fog signal of the other, but that at the time, each had the other's position located on her radar screen. The court is of the opinion that "ascertainment" of a vessel's position by radar is adequate justification for failure to comply with the technical requirement that engines be stopped.

⁵33 U.S.C.A. § 145n.

In view of the foregoing it is the finding of this court that the collision was caused by the mutual fault of the Weyerhaeuser and the Pacific.

[13] Libelant and cross-respondent Weyerhaeuser Steamship Company and respondent and cross-libelant United States of America are each entitled to recover from the other one-half of all provable damages and court costs sustained as a result of this collision according to the settled admiralty law in cases of mutual fault collisions.

In accordance with the foregoing, if the parties cannot agree on the amount of damages, the matter shall be referred to a special commissioner to take evidence upon the amount of damages sustained by each party and to calculate the net balance payable as between the Weyerhaeuser Steamship Company and the United States of America.

It is so ordered.

**SUPPLEMENTAL OPINION OF THE DISTRICT COURT,
DATED JULY 13, 1959**

**In the United States District Court for the Northern
District of California, Southern Division**

**No. 27,359
July 13, 1959.**

**Weyerhaeuser Steamship Company,
a corporation,**

Libelant,

vs.

United States of America,

Respondent.

United States of America,

Cross-Libelant,

vs.

**Weyerhaeuser Steamship Company,
a corporation,**

Cross-Respondent.

**St. Paul Fire & Marine Insurance Co.,
a corporation, and Fireman's Fund In-
surance Co., a corporation,**

Intervening Libelants.

Roche, District Judge.

**The following paragraphs are hereby added to the mem-
orandum opinion of this court in the above-entitled matter
filed July 2, 1959, 174 F.Supp. 663:**

Intervening libelants St. Paul Fire & Marine Insurance Co., Firemen's Fund Insurance Co., and Boston Insurance Co. are entitled to recover from respondent and cross-libelant United States of America all recoverable damages sustained by them and their insured cargo owners as the result of this collision, together with costs.

With respect to Civil action No. 4255 pending in the U. S. District Court for the Western District of Washington entitled Ostrom v. Weyerhaeuser Steamship Company, which action involves a claim for personal injuries allegedly sustained by said Ostrom in this collision, if the ascertainment of the amount of recoverable damages as between Weyerhaeuser Steamship Company and the United States is referred to a special commissioner then said special commissioner shall report to this court the amount if any paid by Weyerhaeuser Steamship Company to said Ostrom in compromise of said lawsuit or the satisfaction of final decree therein leaving the question as to whether such an amount is a recoverable item of said Weyerhaeuser Steamship Company's damages herein for decision by this court.

It is so ordered.

**OPINION OF THE COURT OF APPEALS,
DATED AUGUST 30, 1961**

**United States Court of Appeals
for the Ninth Circuit**

United States of America,

vs.

Weyerhaeuser Steamship Company,

Appellant,

Appellee.

No. 17,187

Aug. 30, 1961

**On Appeal from the United States District Court
for the Northern District of California,
Southern Division.**

**Before: CHAMBERS, BARNES and HAMLEY, Circuit
Judges**

BARNES, Circuit Judge:

This case arises in admiralty upon a libel against the United States, and a cross-libel filed by the United States. The district court thus had jurisdiction under 28 U.S.C. §§ 1345 and 1346, and 46 U.S.C. § 782. A final decree was entered below, and this court has jurisdiction under 28 U.S.C. § 1291.

On September 8, 1955, appellee's vessel, the S.S. F. E. WEYERHAEUSER, collided with appellant's vessel, the United States Army dredge PACIFIC, off the coast of Oregon. The trial court found that both parties were at fault and this finding is not challenged here. The accident caused significant damage to both vessels, and resulted in personal injury. Reynold Ostrom, an employee of the

United States serving on the PACIFIC, recovered compensation from the United States in the amount of \$329.01 under the Federal Employees' Compensation Act (5 U.S. C. §§ 751, *et seq.*). Ostrom also recovered \$16,000 from appellee by settlement. St. Paul Fire & Marine Insurance Company intervened claiming \$19,122.75 as damages under its policy of marine insurance for its cargo general average contribution arising out of the collision, and Fireman's Fund Insurance Company likewise intervened, claiming \$923.85 for its marine insurance cargo general average contribution. The court found (Finding II, Tr. 72) the intervenors had made such general average payments, and also found in favor of intervenor Boston Insurance Company in the sum of \$443.54, on the same basis, or a total general average recovery of \$20,490.14.

In accordance with its findings of mutual fault the trial court divided the damages between the parties as required by maritime law. It found that each party suffered damages as follows:

Weyerhaeuser Steamship Company:

\$27,652.13	physical and detention damages of the S.S. F. E. WEYERHAEUSER
16,000.00	paid to Ostrom in settlement of suit against it.

\$43,652.13 Total provable damages.

United States of America:

\$16,949.12	physical and detention damages of the PACIFIC
20,490.14	payable to intervening libelants (insurance)

\$37,439.26 Total provable damages

(Finding of Fact IV, R. p. 74) Since appellee's provable damages exceeded appellant's damages by \$6,212.87, the court awarded appellee judgment in the sum of \$3,106.44, plus interest. Appellant, claiming that the court erred in including the \$16,000 personal injury award in appellee's provable costs, has taken this appeal.

Appellant does not deny the antiquity or propriety of the maritime rule requiring the apportionment of damages in cases of mutual fault. Appellant also does not deny that in most instances the apportionment rule applies to damages occasioned by personal injuries. Appellant does contend, however, that the apportionment rule does not apply to damages arising from an injury to any employee covered by the Federal Employees' Compensation Act. Under 5 U.S.C. § 757(b), the liability of the United States, under the Act, with respect to the injury or death of an employee is "exclusive and in place of all other liability of the United States . . . to the employee . . . and anyone otherwise entitled to recover damages from the United States . . . on account of such injury or death. . . ." This statute on its face, then, does seem to save the United States harmless from any liability from injury to its employees other than that specified by the statute. The government points out that statutes such as these are "give and take" arrangements. The employer loses his defenses to the employee's action and the employee gets a remedy which is fast and certain. The employer, on the other hand, enjoys a liability which is limited and determinative. To permit recoveries beyond that specifically allowed by the Act would be subversive of the statutory scheme. This is so, appellant contends, even with respect to recoveries by third parties—what cannot be accom-

plished directly should not be permitted by the indirect means of a third party recovery.

That the Federal Employees' Compensation Act provides the sole remedy for injured employees of the United States is well established. That was the only question before the Supreme Court in *Patterson v. United States*, 1959, 359 U.S. 495. And it affirmed *Johansen v. United States*, 1952, 343 U.S. 427, 441, which states: The United States "has established by the Compensation Act a method of redress for its employees. There is no reason to have two systems of redress." (343 U.S. at 439.)¹

¹And see: *Lewis v. United States*, D.C.Cir. 1951, 190 F.2d 22; *Sasse v. United States*, 7 Cir. 1953, 201 F.2d 871; *Smithers & Company, Inc. v. Coles*, D.C.Cir. 1957, 242 F.2d 220, cert. denied 354 U.S. 914; *Underwood v. United States*, 10 Cir. 1953, 207 F.2d 862.

Earlier this year, when this court considered the exclusiveness of an injured person's remedy under the Federal Employees' Compensation Act (46 U.S.C. § 751, *et seq.*) vis-a-vis the Federal Tort Claim Act (28 U.S.C. § 1346(b)), this court said:

"The language of §§ 751(a) and 757(b) of the Federal Employees' Compensation Act . . . is plain and unambiguous. Under the statute the employee, regardless of any negligence, is to receive in case of injury certain definite amounts, which recovery 'shall be exclusive, and in place, of all other liability of the United States.' His recovery is not dependent upon the injury being caused by the negligence of any employees of the United States nor is it reduced or taken from him if the injury is the result of his own negligence. That the remedy provided by the Federal Employees' Compensation Act is to be exclusive is shown by the legislative history of Congress at the time that the statute was amended in 1949. The House Committee Report contains the following:

'It is the committee's purpose to have the language of such Section 7 entirely clear in this respect so as to express the intention that the compensation remedy shall henceforth be the exclusive remedy of a person protected by this act against the United States, or against its instrumentalities in cases in which a suable instrumentality is the employer.' Similarly, the Senate Report states:

'The purpose of the latter is to make it clear that the right to compensation benefits under the act is exclusive

In furtherance of this policy it has been held that a joint tortfeasor may not seek contribution or indemnity from the United States when the joint tortfeasor is sued by the administrator of a deceased United States employee (*Christie v. Powder Power Tool Corp.*, D.D.C. 1954, 124 F.Supp. 693). Appellee contends, however, that this case cannot control here, for it does not deal with the admiralty rule requiring apportionment of damages. Appellee points out that the trial court did not award it any sum as compensation for the injury suffered by Ostrom. Rather the award reflects the damage which appellee suffered as a result of the collision when it was required to compensate Ostrom for his injuries. In other words, appellee sought and received recovery in its own right for appellant's breach of duty to it under the maritime law; appellee claims that its right is not derivative from any right which Ostrom may have had.

The question presented here is a difficult one. Its resolution will abridge either the statutory policy or the maritime law. To allow a third party recovery against the United States on any ground is subversive of the statute limiting the liability of the United States. On the other hand, the money paid to Ostrom is an element of the total damages suffered by appellee. And failure to apportion

and in place of any and all other legal liability of the United States or its instrumentalities of the kind which can be enforced by original proceeding whether administrative or judicial, in a civil action or in admiralty or by any proceeding under any other workmen's compensation law or under any Federal tort liability statute.'

It thus appears that neither the plain language of the statute, its legislative history, nor the prior construction of similar statutes permits a recovery by appellant." (*Posegate v. United States*, 1961, 288 F.2d 11 at 14.)

such damages is a breach of the maritime rule—for the rule requires the apportionment of all damages suffered, without regard to the fact that some of those damages stem from liabilities which could not be imposed against one of the parties but for the apportionment. (*The Chattahoochee*, 1899, 173 U.S. 540.) There appear to be no cases which can be described as controlling, but there are some precedents which may be helpful.

With the first portion of our last statement appellee would not agree. It refers us to *United States v. The S. S. Washington*, E.D.Va. 1959, 172 F.Supp. 905, and *Texas Co. v. United States*, 4 Cir., 1959, affirmed without opinion 272 F.2d 711 (no petition for writ of certiorari filed).

It is true that Judge Bryan in the *Washington-Ruchamkin* case, *supra*, did grant Texas Company, the private shipowner, judgment against the United States (for one-half of the awards made against the Texas Company in favor of the heirs of four soldiers killed aboard the government vessel in the collision)—and also ordered such judgment without deduction for the veterans benefits already paid by the government to the soldiers' heirs. We point out two things. First: the *Washington-Ruchamkin* case was, unlike this present action, brought under the Death on the High Seas Act, 46 U.S.C. § 761. This action was brought under 46 U.S.C. §§ 781-790, the Public Vessels Act. Yet both Acts must be construed together in laying down the pattern and marking the restrictions under which the United States may be sued. *Mejia v. United States*, 5 Cir. 1945, 152 F.2d 686, *cert. denied* 328 U.S. 862; *United States v. Caffey*, 2 Cir. 1944, 141 F.2d 69. Secondly: (and of greater importance) Judge Bryan listed

four issues before him, after the fourth circuit had held "The Texas Company also at fault." The first three do not concern² us here; the fourth assumes as *admitted* the very legal question here in issue.² We do not know why this admission was made by the government in the *Washington* case. But no such admission was made in the instant case. And, of course, the government is not estopped from taking a position here contrary to that it has invariably or occasionally taken previously. *Utah Power & Light v. United States*, 1917, 243 U.S. 389, 409; *United States v. City and County of San Francisco*, 1941, 310 U.S. 16, 32.

Appellee concludes its references to the *Washington* case in its brief with the following appeal to the court's conscience:

"The fact is that the United States with knowledge of the admiralty mutual fault collision rule enacted a scheme of compensation for its employees injured in the performance of duty without reference to negligence. Insofar as Weyerhaeuser is concerned the employee's compensation has nothing to do with this collision and should have no bearing on Weyerhaeuser's right to have all the damages resulting from the collision mutually apportioned between the two vessels. Any other result would be grossly unfair."

²The opinion raises as the fourth question before the court:

"(d) whether against the *admitted* right of The Texas Company to reimbursement from the government for one-half of the death awards as collision damages, the United States may offset the sums paid and payable by the government to the decedents' dependents as statutory death gratuities, indemnity, and compensation." (Emphasis added.) 172 F.Supp. 905 at 907.

Whether fair or unfair, the Supreme Court has established the rule that the United States cannot be burdened *directly* with tort liability for injuries sustained by its employees. We do not presume that if there had never been a retreat by the United States from its absolute nonliability as a sovereign, appellee could or would here maintain that such claim of sovereignty was inferior to the right established by admiralty law, no matter how ancient, simply because unfair to the shipowner. Any claim of sovereign immunity is to some extent always unfair to the one who has sustained loss or damage.

But can a limited waiver of sovereign immunity be enlarged by indirection, i.e., through the negligent act of a third party—the ship owner? We think not.

There has been no question for one hundred years as to the general maritime rule that a total loss in collision cases is divided where both vessels are at fault. *The Catherine*, 1954, 58 U.S. 171, 177; *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 1952, 342 U.S. 282. And appellee cites to us as examples where damages *have been allowed* against the government two cases: *The City of Rome*, 2 Cir. 1930, 38 F.2d 782, 786; *Chicago-Silverpalm*, 9 Cir. 1937, 94 F.2d 771.

The City of Rome concerned itself only with an attempt to exempt or limit liability by Ocean Steamship Company (as the owner of *The City of Rome*) from the claims of Goldye M. Dobson, as Administratrix, against it; and its claim for damages against The United States for property damages. Judge Learned Hand specifically avoided any “question of marshalling the proceeds of the *Rome* as between the United States and the private claimants.”

Further, this case was decided in 1930. Title 5 U.S.C. § 757(b) (the exclusive liability subsection) was created by the Act of October 14, 1949, Sec. 303(g). It was given but a limited retroactive effect. (See U.S. Code, 1952 Ed., Title 1-14, p. 371.)

Chicago-Silverpalm, supra, is cited to us as 94 F.2d 771. *The Silver Palm* appears in 94 F.2d 754, and holds the United States at mutual fault with the private shipowner for a collision. It does not touch upon the matter here involved. *The Silver Palm (Silver Line v. United States)*, 9 Cir. 1937, 94 F.2d 776, has solely to do with limitation of liability on the Silver Palm's part. In *The Silver Palm (Silver Line v. United States)*, 9 Cir 1937, 94 F.2d 781, the appeal was from an order permitting the administrators of three deceased naval officers to proceed with their wrongful death suits. The appeal was dismissed as moot. Neither *The Silver Palm* cases, nor *The Rome* case, establish the principle claimed by appellee that "similar damages have been uniformly allowed in previous cases against the government." (Appellee's Brief, p. 10.) Nor do alleged voluntary settlements by the government establish a right specifically excluded and prohibited by an Act of Congress, as is argued in appellant's brief. However, there is authority to support the appellee's position. In *The Tampico* case (W.D.N.Y. 1942, 45 F.Supp. 174), a stevedore was injured while transferring cargo from a barge to *The Tampico*. The stevedore, who was employed by *The Tampico*'s owner, sued the barge owner claiming that the barge was defective. The barge owner impleaded the owner of *The Tampico*, claiming that it was negligent in operating a "clamshell bucket" used in transferring

cargo. The *Tampico's* owner was immune from personal injury suits by its employees, for it was covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.* The "exclusiveness of liability" under this Act, 33 U.S.C. § 905, is similar in extent to 5 U.S.C. § 757(c). Nevertheless, the trial court held that the barge owner could obtain contribution from the owner of *The Tampico*. The *Tampico's* owner was immune from suits brought by the stevedore or anyone in his right, but "the right in admiralty to contribution between wrongdoers does not stand on subrogation but arises directly from the tort." We must note, of course, that this is a district court case, not binding on this court, and of limited precedential value.

The Tampico was cited and quoted with approval by a higher court in *Hilaffer v. Argonne Co.*, D.C.Cir. 1950, 183 F.2d 811, *cert. denied* 340 U.S. 852. In that case appellant's husband was injured during the course of his employment; his employer, as in *The Tampico*, was covered by the Longshoremen's and Harbor Worker's Compensation Act. The wife claimed that the injury to her husband had interfered with her marital relationship and she sued for loss of consortium. The court held that the action for loss of consortium does not stand on subrogation but arises directly from the tort. Thus the wife was not suing in her husband's right; she was suing in her own right and was entitled to damages for her loss. Accordingly, the court held that the wife's right to damages for loss of consortium was not barred by the Compensation Act. This case, however, was expressly overruled in 1957 in *Smithers & Company Inc. v. Coles*, D.C.Cir., 242 F.2d 220.

cert. denied 354 U.S. 914, a case heard by the District of Columbia Circuit en banc. The court noted that the right to damages for loss of consortium must be regarded as a right "flowing from" the spouse's injury:

"Whether the right of a spouse be regarded as independent, i.e., arising directly from the tort, or as derivative, that right does not come into existence except for the occurrence of the injury. Absent a compensable injury to the one spouse there would be no claim to assert against the employer." (242 F.2d 224-225.)

Expressing its disagreement with *Hitafter*, the court in *Smithers & Company Inc. v. Coles* held that all liability "flowing from" the employee's injury is governed by the Act:

"In the *Hitafter* opinion this court conceded that the 'plain and literal language' of this statute *could* be construed to bar 'any right of action flowing from the compensable injury,' but rejected that interpretation. We think the statute cannot be read any other way without doing extreme violence to those 'plain and literal' words read in the light of the purposes of the Act." (242 F.2d at 224.)

The same result had already been reached by the tenth circuit with respect to the Federal Employees' Compensation Act, the statute which is in issue here (*Underwood v. United States*, 10 Cir. 1953, 207 F.2d 862).³ The *Under-*

³We agree with the reasoning of the tenth circuit. There the court said:

"It is significant, we think, that the Congress chose to speak in terms of liability of the government, not in terms of remedies or rights of action, and in doing so, it gave a right of action only to the extent that it saw fit to relax governmental immunity from any liability." *Underwood v. United States*, 10 Cir., 1953, 207 F.2d 862, 864.

wood case received the approbation of this court in *Thol v. United States*, 9 Cir. 1954, 218 F.2d 12, 14. The *Smithers & Company Inc. v. Coles* and *Underwood* cases are, we think, persuasive authority here.⁴ In our opinion the shipowner's right of action is just as dependent upon the employee's injury as the wife's claim for loss of consortium; or to put it more precisely, the shipowner's claim is no more independent of the employee's injury than is the wife's. If, then, the policy of the statute bars the wife's action for loss of consortium, it should also bar the shipowner's action for contribution.

The authority supporting appellee's position is not so persuasive as the cases last cited above. While *The Tampico* supports appellee's cause, it was, in the eyes of one court overruled by *American Mut. Liability Ins. Co. v. Matthews*, 2 Cir. 1950, 182 F.2d 322. (See *Coates v. Poto-mac Elec. Power Co.*, D.D.C. 1951, 95 F. Supp. 779.) For this reason, appellee did not cite *The Tampico*. We cannot agree that the *Matthews* case overrules *The Tampico*. *Matthews* held only that the Longshoremen's and Harbor Workers' Compensation Act prevents the joint tortfeasor from obtaining contribution from the employer covered by the Act. This parallels the holding, under the Federal Employees' Compensation Act, in *Christie v. Powder Power Tool Corp.*, *supra*. It does not deal with the problem presented by the admiralty rule and the point raised

⁴As the District of Columbia Circuit pointed out in *Smithers*:

"[E]very court which had undertaken to construe the same or similar exclusionary clauses prior to the *Hitafer* case had arrived at a result in conflict with the decision of this court in *Hitafer*. [cases noted] Cases decided subsequent to the *Hitafer* case also followed the literal language of statutes cast in substantially the same terms." 242 F.2d 226 at 225.

by *The Tampico*, viz. that the suit based upon the admiralty rule is an independent cause of action not founded upon the injured employee's right but founded upon the employee's breach of a duty to other shipowners to exercise care in navigation. This point is involved, however, in the persuasive authority discussed above relating to a spouse's right to sue for loss of consortium. Thus, while it does not appear that *The Tampico* has been overruled, it has been robbed of its persuasiveness by subsequent developments.

Appellee places its principal reliance upon a series of cases interpreting the Harter Act, the most emphasis being placed on *The Chattahoochee*, *supra*. There a steamer and a schooner collided, both vessels being at fault. The owners of the schooner were awarded damages as bailees of the cargo, but the steamer was allowed to recoup half of the value of the cargo—even though the schooner was not liable to the cargo owners (under Section 3 of the Harter Act, 46 U.S.C. § 192). The shipowner's statutory exemption from liability did not preclude a recovery against it under the maritime rule. Thus, appellee claims, the statutory limitation upon the employer's liability to his employee should not destroy his liability under the maritime rule.

We concede that *The Chattahoochee* is strong authority in favor of appellee's position. There is, of course, the obvious distinction in the fact that *The Chattahoochee* interprets the Harter Act while we are here called upon to interpret the Federal Employees' Compensation Act. But a mere comparison of statutory phraseology will not aid in resolving the problem. The Harter Act provides cate-

gorically that the shipowner shall not be liable for losses due to faults of navigation. While this command may not be so specific as that contained in the Compensation Act, it is as clear and strong. But the language of the Harter Act must be considered in light of the judicial gloss which has been placed upon it. In *American Mut. Liability Ins. Co. v. Matthews, supra*, we learn (182 F.2d at 324) that "The Harter Act was not intended to affect the liability of one vessel to the other in a collision case . . ." Can the same be said with respect to the Compensation Acts? We have already seen that such Acts cut off the spouse's right to damages for loss of consortium. And there is no sound reason why a distinction should be made between such cases and the case of a shipowner seeking contribution under the admiralty rule. The Acts, in establishing the duty of the employer and in making that duty exclusive, have abolished the independent rights of third parties against the employer for the damage which the employer causes them when he wrongfully injures his employee. Thus it must be candidly admitted that while the United States once had a duty to other shipowners to navigate carefully in order not to injure its own employees, that duty has been abrogated by the Compensation Act. We hold *The Chattahoochee* is not here controlling because it deals with a different statute which has encrusted upon it a significantly different judicial history.

The policy of an Act which precludes a wife's recovery for loss of consortium also precludes a shipowner's claim for contribution from a joint tortfeasor. The judgment below is reversed with directions to recompute damages without any allowance for the \$16,000 paid by appellee to the injured United States employee, Ostrom.

The government raised a second issue regarding the trial court's interpretation of the rules of the sea in connection with the use of radar. Since both parties admitted the propriety of the trial court's finding of mutual fault, this issue does not bear upon the correctness of the judgment. Appellant briefed the issue only very sketchily and appellee has not briefed the issue at all. In the absence of an actual controversy with adequate briefing by both sides, this court should not be called upon to render a decision on the issue. It appears that the appellant is requesting an advisory opinion, and, of course, federal courts generally refrain from rendering such opinions. (*Muskat v. United States*, 1911, 219 U.S. 346.) We so refrain here.

Reversed with instructions.

(Endorsed) Opinion Filed Aug. 30, 1961.

Frank H. Schmid, Clerk.

FINAL DECREE, DATED JUNE 20, 1960

In the United States District Court for the Northern
District of California, Southern Division

In Admiralty

No. 27,359

Weyerhaeuser Steamship Company,
a corporation,

Libelant,

vs.

United States of America,

Respondent.

United States of America,

Cross-Libelant,

vs.

Weyerhaeuser Steamship Company,
a corporation,

Cross-Respondent.

St. Paul Fire & Marine Insurance Co.,
a corporation; Boston Insurance Co., a
corporation, and Fireman's Fund In-
surance Co., a corporation,

Intervening Libelants.

FINAL DECREE

The above entitled cause having been fully tried and decided, and the Court having heretofore made interlocutory Findings of Fact and Conclusions of Law by Memorandum Opinions filed herein, and having there-

after made Findings of Fact and Conclusions of Law as to damages,

Now, Therefore, in accordance with the aforesaid opinions, findings and conclusions,

It is finally Ordered; Adjudged and Decreed as follows:

1. Libelant Weyerhaeuser Steamship Company shall have and recover from respondent United States of America the sum of \$3,106.44, together with interest thereon at 4% per annum from date hereof.

2. The costs of libelant Weyerhaeuser Steamship Company being taxed at \$313.90, and the costs of respondent United States being taxed at \$432.26, the party having the larger amount of such costs, to wit: The United States shall recover one-half the excess thereof, to wit: \$59.18, from the other party, to wit: Weyerhaeuser SS Co., and respondent United States shall recover from libelant Weyerhaeuser Steamship Company one-half of the total costs of \$66.00, taxed against respondent United States and in favor of intervening libelants.

3. When the costs of said libelant and respondent shall have been taxed, the party having the larger amount of costs shall recover one-half the excess thereof from the other party.

4. Intervening libelant St. Paul Fire and Marine Insurance Company shall have and recover from respondent United States of America the sum of \$19,122.75, together with interest thereon at 4% per annum from date hereof, and its costs of suit, taxed at \$22.00.

5. Intervening libelant Fireman's Fund Insurance Co. shall have and recover from respondent United States of

America the sum of \$923.85, together with interest thereon at 4% per annum from date hereof, and its costs of suit, taxed at \$22.00.

6. Intervening libellant Boston Insurance Company shall have and recover from respondent United States of America the sum of \$443.54, together with interest thereon at 4% per annum from date hereof, and its costs of suit, taxed at \$22.00.

Done in open court this 17th day of June 1960.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Approved as to Form:

LYNN J. GILLARD,
United States Attorney.

KEITH R. FERGUSON,
Special Assistant to the
Attorney General.

/s/ By JOHN F. MEADOWS.

DERBY, COOK, QUINBY, TWEEDT,
/s/ By STANLEY J. COOK.

GRAHAM JAMES & ROLPH,
/s/ By HENRY R. ROLPH.

[Endorsed]: Lodged June 6, 1960; Filed June 17, 1960;
Entered June 20, 1960.

Appendix B

In the United States District Court for the Eastern
District of Virginia at Alexandria

In Admiralty No. 780

**LIBEL OF TEXAS COMPANY AS OWNER OF THE TANKER
WASHINGTON AGAINST UNITED STATES OF AMERICA**

Seventh. By reason of the premises, the libelant has sustained damages, including the cost of repairs to the *Washington*, towage, loss of use and other expenses in the sum of approximately \$150,000, no part of which has been paid, although payment thereof has been duly demanded. *Claims have also been made against the libelant for damages alleged to have been suffered by reason of the loss of the lives of several members of the Armed Forces stationed on board the U.S.S. Ruchamkin. Many other claims have been made for personal injuries and loss of property suffered by reason of the aforesaid collision. If libelant is held responsible for any such claims for loss of life, personal injury or loss of property, the libelant hereby claims reimbursement therefor from the respondent.*

Eighth. Libelant elects to have this suit proceed in accordance with the principles of libels *in personam* and *in rem*.

• • •

In Admiralty No. 780

THE TEXAS COMPANY AS OWNER OF THE TANKER WASHINGTON AGAINST THE UNITED STATES OF AMERICA

Answer of the United States

The answer of cross-respondent, the United States of America, to the cross-libel of The Texas Company, originally brought as a separate libel in the Southern District of New York and transferred to this district, in a cause of collision and damage, civil and maritime, alleges on information and belief as follows:

• • •

Seventh. Denies the allegations of Article Seventh of the libel.

AFFIDAVIT

State of New York
County of New York—ss.

I, JOSEPH M. BRUSH, an attorney in the State of New York, and practicing law with the firm of Brush & Michelsen, 26 Broadway, New York 4, New York, being duly sworn, depose and say:

I served as an attorney for The Texas Company, which was the appellant and cross-appellee in the case of *United States v. The S. S. Washington*, 172 F.Supp. 905 (1959), affirmed in 272 F.2d 711 (1959), upon the opinion of the District Court.

Throughout the trial of the above-named case in the District Court, the issue of The Texas Company's right to include death and injury payments made to servicemen and their survivors in its collision damage claim against the Government of the United States was never admitted by the attorneys for the United States. United States, in fact, throughout the trial of this case, positively refused to stipulate their assent to include these damages. The point thus remained in issue, being raised by Count VII of the libel of The Texas Company and denied in the Government's answer. This issue was resolved in Judge Bryan's opinion.

JOSEPH M. BRUSH

Subscribed and sworn to before me on this 25th day of September, 1961, in the City of New York, New York.

(Seal)

IRENE K. McDERMOTT

Notary Public, State of New York
No. 60-7814800

Qualified in Westchester County
Cert. Filed with N. Y. Co. Reg.
Commission Expires March 30, 1962

*In the United States Court of Appeals
for the Fourth Circuit*

No. 7191

United States of America, Owner of the USS Ruchamkin
Appellant, Cross-Appellee,

v.

SS Washington, Her Engines, etc., The Texas Company etc.,
Appellee, Cross-Appellant,

v.

Parley Bright, Administrator, et al., Appellees

On Appeal from the United States District Court for the
Eastern District of Virginia

BRIEF AND APPENDIX FOR THE UNITED STATES

STATEMENT OF THE CASE AND QUESTIONS INVOLVED

These appeals by the United States and The Texas Company arise out of the collision off the Virginia capes on November 14, 1952 between the *SS Washington*, owned by the Texas Company, and the *USS Ruchamkin*, a Navy destroyer. On prior appeals by the United States and by the claimants asserting death claims against Texas, this Court (241 F. 2d 819, certiorari denied, 355 U.S. 817), reversing in part a decree of the district court (141 F. Supp. 97), held that the *Ruchamkin* and the *Washington*

were both at fault. On remand, District Judge Bryan, on March 10, 1959, determined that the estates of four servicemen, who died as a result of the collision, recover from Texas an aggregate of \$112,000 (App. 27). The court decreed that the awards against Texas are includable as part of The Texas Company's collision damage and that Texas recover over one-half the awards (\$56,000) as contribution from the United States (App. 28). The court further held that the United States was not entitled to offset against The Texas Company's right of contribution, statutory death benefits and compensation paid and payable by the United States to the surviving dependents of the deceased service personnel.

This appeal by the United States from the decree of March 10, 1959 presents the following questions:

1. *Whether the district court erred in holding that The Texas Company was entitled to contribution from the United States for one-half its liability for the wrongful death of the service personnel who died as a result of the collision of November 14, 1932.*

2. *If the United States is liable to The Texas Company, whether the district court erred in refusing to consider, by way of mitigation or offset of the Government's liability, death benefits and compensation paid and payable to the dependents of the deceased service personnel.*